14-19-00154-CR

In the
Court of Appeals
for the Fourteenth Judicial District of Texas
at Houston

No. 1527611
In the 208th District Court
of Harris County, Texas

THE STATE OF TEXAS
Appellant
V.
JOHN WESLEY BALDWIN
Appellee

STATE'S RESPONSE TO APPELLEE'S MOTIONS FOR REHEARING AND EN BANC RECONSIDERATION

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REPLY TO APPELLEE'S GROUND FOR REHEARING:
The majority correctly held that the affidavit established a fair probability that the search would produce evidence of the murder.

A. Applicable Law

A peace officer must obtain a warrant from a magistrate to search a person's cell phone after a lawful arrest. *State v. Baldwin*, --- S.W.3d ---, 14-19-00154-CR, 2020 WL 4530149, *3 (Tex. App.—Houston [14th Dist.] Aug. 6, 2020, no pet. h.). Where, as in the present case, the officer seeks to investigate a crime already committed, an affidavit in support of an application for a warrant must show that a crime has been committed and that a search of the cell phone is likely to produce evidence in the investigation of that crime. *Id*.; *see also* TEX. CODE CRIM. PROC. art. 18.0215(c)(5).

A magistrate's decision that an officer's affidavit shows probable cause that there is a fair probability that evidence of a crime will be found is entitled to a high degree of deference. *Id*.; *see also State v. Duarte*, 389 S.W.3d 349, 354 (Tex. Crim. App. 2012); *State v. McLain*, 337 S.W.3d 268, 271 (Tex. Crim. App. 2011). A reviewing court "presume[s] that the magistrate's decision was valid, and [it] must uphold that decision if [it] can determine that the magistrate had a substantial basis

for finding the existence of probable cause." *Id*.; *see also Hyland v. State*, 574 S.W.3d 904, 911 (Tex. Crim. App. 2019).

B. The affidavit established a fair probability that the search would produce evidence of the murder.

In his motions, the appellee relies chiefly upon two assertions to support his contention that the affidavit was insufficient to support the warrant: (1) there was no "clear nexus" between the appellee's vehicle and the capital murder; and (2) there was "no evidence" that the cell phone was used in connection with the offense or contained evidence of the offense. (Appellee's Motion at 9, 12). But the majority opinion addressed both of these concerns. And the totality of the circumstances supported the magistrate's finding of probable cause, a "flexible, nondemanding standard." *Duarte*, 389 S.W.3d at 354.

The appellee first argues that there was an insufficient nexus between his vehicle and the capital murder. (Appellee's Motion at 10). Further, and despite the list of supporting facts offered in the majority opinion, the appellee maintains that any implicit finding that there is a clear nexus is unreasonable. *Id*. No doubt uninterrupted drone footage of an individual exiting a vehicle identifiable by make, model, and license plate number committing an offense and climbing back into the same vehicle before exiting the scene would be optimal evidence. But the law does not require such evidence. *See Davis v. State*, 202 S.W.3d 149, 156-57 (Tex. Crim.

App. 2006). The law allows a magistrate to consider the totality of the circumstances. *See Duarte*, 389 S.W.3d at 354. It allows a reviewing court to consider "the combined logical force of the evidence." *Baldwin*, 2020 WL 4530149 at *4. And it requires that court to give a high degree of deference to a magistrate's ruling. *See Duarte*, 389 S.W.3d at 354.

Although the appellee deftly attempts to differentiate the present case from *Ford*, upon which the majority opinion relies in part, the case was apropos. (Appellant's Motion at 11-12) (referencing *Ford v. State*, 444 S.W.3d 171, 193 (Tex. App.—San Antonio 2014, *aff'd*, 477 S.W.3d 321 (Tex. Crim. App. 2015))). Yet the appellee judges the cases differently. When discussing *Ford*, the appellee considers the combined evidence in assessing the strength of the nexus. And the appellee notes that the court considered "the nexus between Ford and the murder." (Appellee's Motion at 11). But when the appellee considers the nexus in this case, it is between only the vehicle and the murder, not—more broadly—the appellee and the murder. (Appellee's Motion at 13) ("The affidavit does not establish a nexus between the vehicle appellee was driving four days after the murder and the white sedan observed fleeing the scene after the murder.").

Regardless, the majority established at length that there was a sufficient nexus between the vehicle and the murder. *Baldwin*, 2020 WL 4530149 at *4-5. And the appellee glosses over the fact that one concerned citizen took a picture of the sedan

circling the neighborhood where the murder was committed *on the day before the murder* that captured the license plate number. *Id*. The appellee was pulled over in the same vehicle. *Id*. at *5. A vehicle matching the same description, though admittedly not identified by plate number, was also seen in the neighborhood on the same night as the murder. *Id*. at 4. The majority opinion's reliance upon *Ford* is not misplaced; *Ford* is on point.

As to the appellee's concern that the officer's affidavit failed to supply information connecting the cell phone to the offense, the majority opinion conceded that "the affidavit did not contain any particularized facts that directly connected the cellphone to the capital murder." *Baldwin*, 2020 WL 4530149 at *4. But such information was not required. As previously noted, the standard for probable cause is a "flexible, nondemanding standard[;]" it takes into account the totality of the circumstances. *Duarte*, 389 S.W.3d at 354. The majority opinion recognized that "the affidavit still established that the cellphone was recovered from a sedan, and there were other facts establishing a nexus between the sedan and the capital murder." *Baldwin*, 2020 WL 4530149 at *4.

The involvement of more than one person in the murder here allowed the magistrate to reasonably infer that the perpetrators possessed or utilized one or more cell phones before or during the planning or commission of the offense and that any recovered cell phones could have evidence of the offense. *See Id*.; *see also Diaz v.*

State, --- S.W.3d ---, 14-17-00685-CR, 2020 WL 4013189, *6 (Tex. App.—Houston [14th Dist.] July 16, 2020, pet. granted).[1] As the majority here noted, "direct evidence is not an indispensable requirement for the issuance of a search warrant." *Baldwin*, 2020 WL 4530149 at *7 (citing *Davis v. State*, 202 S.W.3d at 156-57).

The appellee in the present case asks this Court to grant rehearing to do what the majority opinion correctly and explicitly rejected—focus on what might have been included in the affidavit rather than what was included. As the majority opinion noted, "[t]he issue is not whether there are other facts that could have, or even should have, been included in the affidavit;" a reviewing court "focus[es] on the combined logical force of facts that *are* in the affidavit, not those that are omitted from the affidavit." *Id*. at *3 (emphasis in original). Here, the majority opinion appropriately considered the totality of the circumstances, deferred to the magistrate's finding, and reversed the portion of the trial court's decision granting the appellee's motion to suppress. Because the majority opinion is in accord with Texas law and precedent, the appellee's motions for rehearing and *en banc* reconsideration should be denied.

[1] As the appellee notes in his motions, the Court of Criminal Appeals has granted a petition for discretionary review in the *Diaz* case. As of the State's filing of this response, the Court of Criminal Appeals has not yet completed a review of *Diaz*.

CONCLUSION

It is respectfully submitted that this Court should deny the appellee's motions for rehearing and *en banc* reconsideration.

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